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IN THE

SUPREME COURT

OF THE

UNITED STATES.

November Term, 1936
No. 79.

Clarence G. Kunsman

vs.

Max Factor & Co., and Sales Builders, Inc.,

APPELLANT'S BRIEF.

STATEMENT OF FACTS.

A. Origin and Nature of the Cause.

This is an appeal from a decision of the Supreme Court of the State of California, rendered in *Max Factor & Co. et al. v. Kunsman,* ..... Cal. .....; 91 Cal. Dec. 345; 55 Pac. (2d) 177.

Appellees filed an action against appellant under Section 1½ of the California Fair Trade Act (Stats. of Cal. 1931, chapter 278, page 583, as amended by Stats. of Cal. 1933, chapter 260, page 793) for an injunction to restrain appellant from knowingly selling certain trade-

marked cosmetic and toilet articles manufactured by appellee, Max Factor & Co., and distributed by appellee, Sales Builders, Inc., at a price less than the resale price fixed by said appellees in certain contracts entered into between appellees and third persons. [Tr. of Record, pp. 1-21.] Appellant was not a party to such contract. [Tr. of Record, p. 10, par. XIV of Complaint.] Appellant raised the objection that Section 1½ of the Fair Trade Act was unconstitutional by filing a general demurrer to the complaint. [Tr. of Record, p. 21.] A hearing on said demurrer was had and the trial court thereupon made its order sustaining appellant's demurrer without leave to amend, on the ground that Section 1½ of the Fair Trade Act violated the 14th Amendment to the Constitution of the United States. [Tr. of Record, p. 22.] Judgment was entered on said order. [Tr. of Record, pp. 22-23.] Appellees appealed from said judgment, to the Supreme Court of the State of California and said court rendered its judgment reversing the judgment entered by the trial court on the order sustaining appellant's demurrer without leave to amend. [Tr. of Record, pp. 23-43.] Appellant's petition for a rehearing was denied, at which time the State Court modified its opinion by ordering the trial court to enter final judgment for the appellees by reason of appellant's election to stand upon his demurrer. [Tr. of Record, pp. 54-55.] The Supreme Court of the State of California, in reversing said judgment of the trial court, ruled that Section 1½ of the Fair Trade Act did not deprive the appellant of his liberty

or property without due process of law, in violation of the 14th Amendment of the Constitution of the United States.

Appellant appeals to this Honorable Court on the grounds that the conclusion reached by the Supreme Court is erroneous and that Section 1½ of the California Fair Trade Act is unconstitutional in that it deprives appellant of his liberty and property without due process of law.

The complaint, although an elaborate one, in substance alleges as follows [Tr. of Record, pp. 1-21):

That appellees are respectively the manufacturer and selling distributor of certain cosmetics and toilet articles, all of which bear trademarks registered in accordance with the laws of the United States of America; that appellant is the owner and operator of a retail drug store in the City of Beverly Hills, California; that subsequent to the effective date of the 1933 Amendment to the Fair Trade Act of the State of California, appellees adopted a system of doing business whereby appellee, Sales Builders, Inc., entered into certain contracts with its wholesale and jobbing distributors and with various retailers, by the terms of which said wholesalers and jobbers covenanted not to sell appellees' product to any retailers, save and except those who executed contracts with appellee, distributor, agreeing to sell said products at retail prices not less than those set forth in said contracts, and whereby said retailers agreed to sell said products at specified prices. It is then alleged that practically all of the wholesale and

retail druggists in California have executed such contracts, but that appellant, a retail druggist, declined to do so. Then follow allegations to the effect that appellant conceived and adopted a wrongful and unlawful plan to injure appellees, in that he purchased appellees' commodities from sources unknown to them and was selling certain of such commodities at prices lower than those established by appellee, Sales Builders, Inc., in its contracts with retailers. It is claimed that if appellant is permitted to continue, a large number, if not all of appellees' wholesale and retail contracts, may be cancelled by said wholesalers and retailers and that appellees' business will thereby be injured.

There is no allegation that appellant has maliciously, or otherwise, induced any wholesaler or retailer, with whom appellees have entered into contracts, to breach such contract, nor is it claimed that appellant has interfered with appellees' business in any manner other than by selling commodities manufactured and distributed by appellees at prices below those established by them in contracts to which appellant was not a party. It is not alleged that any contractual relationship, concerning the commodities sold by appellant, referred to in the complaint, has ever existed between appellant and appellees, or either of them. The complaint is thus framed solely upon the strength and authority of Section 1½ of the California Fair Trade Act, and unless said Amendment can be sustained as constitutional appellees' cause of action must necessarily fail.

B. The Statute Involved.

In 1931 the California legislature adopted an Act, commonly known as the "Fair Trade Act". (Stats. 1931, chapter 278, page 583, Act 8782 Deering's General Laws of California.) It reads as follows:

> "An act to protect trademark owners, distributors and the public against injurious and uneconomic practices in the distribution of Articles of standard quality under a distinguished trademark, brand or name.
>
> (Approved May 8, 1931, Stats. 1931, p. 583. In effect August 14, 1931.)
>
> 1. Certain sale contracts declared lawful.
> 2. Exception.
> 3. Definition.
> 4. Constitutionality.
> 5. Short title.
>
> "1. Certain Sale Contracts Declared Lawful.—No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears the trademark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the state of California by reason of any of the following provisions which may be contained in such contract:
>
> 1. That the buyer will not resell such commodity except at the price stipulated by the vendor.
>
> 2. That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

1. In closing out the owners' stock for the purpose of discontinuing delivering any such commodity.

2. When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

3. By any officer acting under the orders of any court.

"2. Exception.—This act shall not apply to any contract or agreement, between producers or between wholesalers or between retailers as to sale or resale prices.

"3. Definitions.—The following terms, as used in this act, are hereby defined as follows:

'Producer' means grower, maker, baker, manufacturer or publisher.

'Commodity' means any subject of commerce.

"4. Constitutionality.—If any provision of this act is declared unconstitutional it is the intent of the legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect.

"5. Short title.—This act may be known and cited as the 'Fair Trade Act'."

Prior to the adoption of this law, contracts for resale price maintenance were invalid in California under the Cartwright Act. (Calif. Stats. 1907, p. 984; Stats. 1909, p. 583, Deering's Gen. Laws, Act. 8702.)

The Fair Trade Act, therefore, constituted a radical departure from the traditional and accepted law respecting contracts, combinations and monopolies restraining trade, through price-fixing agreements. (Compare *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373, 55 L. ed. 502, 31 S. Ct. 376.) Its effect was to remove the commodities therein mentioned from the operation of the Cartwright Act, by permitting parties by voluntary contract to fix the resale price of such articles. Thus it restricted, where the Cartwright Act required, price competition as to the commodities referred to in the Act.

In 1933 the California legislature added a new section to said Fair Trade Act, being the provision whose constitutionality is here involved, designated as Section 1½ (Stats. of California, 1933, chapter 260, page 793), which provides as follows:

> "Sales Below Contract Price.—Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of Section 1 of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

This Amendment purports to extend the operation of the original Fair Trade Act to all dealers who knowingly resell commodities with respect to which a resale price has been fixed by the manufacturer in any contract entered into under the original act. It does this irrespective of the fact that such dealers are not parties to, and have

never agreed to be bound by, the provisions of any such contracts.

In the present case appellant has entered into no contract with appellees respecting the commodities owned and sold by him. However, appellees, acting under the authority of said Section 1½ of the Fair Trade Act, seek to bind appellant by prices fixed by them in contracts to which he is not a party and to the provisions of which he has never assented. Appellant contends that when the California legislature thus attempted to subject appellant to the arbitrary will of appellees, with respect to the prices charged by him in the sale of his own property, it transcended the legitimate boundaries of legislative authority.

C. Importance of the Question.

Section 1½ of the Fair Trade Act poses the question of the authority of a private individual to restrict the right of another person with whom he has no contractual relation, to sell his own property at prices of his own choosing. Admittedly, such a statute is both novel and revolutionary. Although the California legislature was the first to enact such legislation, following its lead a number of other states have since adopted similar laws. (C. C. H.: Federal Trade Regulation Service, Vol. II (7th ed.), pp. 60,001-60,485.) Thus far, judicial authority in the state courts has divided almost equally upon the question of their constitutionality. Prior to the determination of the within cause by the California Supreme Court, both the New York Supreme Court and the New York

Court of Appeals had held unconstitutional an identical statute.

Coty, Inc. v. Hearn Department Stores, 158 Misc. 516, 284 N. Y. S. 909;

Doubleday, Doran & Co. v. Macy & Co., 158 Misc. 267, 284 N. Y. S. 533; Aff. 269 N. Y. 272, 199 N. E. 409.

Since the decision herein, the New York Court of Appeals has had occasion to reaffirm its decision.

Seecke & Kade, Inc. v. Tomshinsky (Memo. Decis.), 269 N. Y. 613, 200 N. E. 23.

In New Jersey a chancery decision has overthrown a similar statute.

Johnson & Johnson v. Weisbard, 120 N. J. Eq. 314, 184 At. 783.

On the other hand, the Supreme Court of Illinois has upheld the Illinois Fair Trade Act.

Triner Corp. v. McNeil, ... Ill. ....., 2 N. E. (2d) 929;

Seagram Distiller Corp. v. Old Dearborn Co., ... Ill. ....., 2 N. E. (2d) 940.

The clash of judicial opinion represented by these conflicting decisions was not entirely unexpected, as the subject of resale price maintenance has, for many years, been a prolific source of controversy among economists and legal students. There is set forth in the appendix a partial bibliography on the subject. While, for the most part, these authorities deal with the subject of resale price maintenance secured by private contract, the origin, nature, development and present status of the practice, as disclosed therein, may serve as a useful background for the present discussion.

D. Appellant's Assignment of Errors.

Appellant urges herein all of the errors set forth in his assignment of errors heretofore filed herein. [Tr. of Record, pp. 58-59.] They are as follows:

"1. That the Supreme Court of the State of California erred in reversing the judgment of the Superior Court of the State of California, entered on the order sustaining appellant's demurrer to appellees' complaint without leave to amend, and in thereby holding constitutional, Section 1½ of a statute of the State of California entitled 'An Act to Protect Trademark Owners, Distributors and the Public Against Injurious and Uneconomic Practices in the Distribution of Articles of Standard Quality Under a Distinguished Trademark, Brand or Name', which act is commonly known as the 'Fair Trade Act' (Stats. of California, 1931, Chapter 278, as amended by the addition of Section 1½ of said act, Stats. of California 1933, Chapter 260)."

"2. That the Supreme Court of the State of California erred in failing to render judgment in favor of appellant, affirming the judgment entered on the order of the trial court sustaining appellant's demurrer to appellees' complaint, without leave to amend."

"3. That the Supreme Court of the State of California erred in failing to hold that Section 1½ of said Fair Trade Act violates the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it deprives appellant of his property without due process of law."

"4. That the Supreme Court of the State of California erred in failing to hold that Section 1½ of said Fair Trade Act violates the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it deprives appellant of his liberty without due process of law."

E. Summary of Argument.

I.

Section 1½ of the California Fair Trade Act Is Unconstitutional in That It Authorizes Price Fixing as to Commodities Not Affected With a Public Interest.

(A) Section 1½ of the California Fair Trade Act Is a Price Fixing Statute.

Section 1½ of the California Fair Trade Act authorizes any manufacturer or distributor of the commodities therein referred to, by entering into a single contract prescribing its minimum resale price, to enforce such restriction on all wholesalers or retailers dealing in such commodity, having knowledge thereof, despite the fact that they are not parties to such contract. The act is not limited to trademarked, or even to well advertised commodities, but extends to all commodities which bear the trademark, brand or name of the producer or owner. Consequently, the act authorizes price fixing with respect to the almost unlimited number of articles which comprise consumers' goods.

(B) Section 1½ of the California Fair Trade Act Fixes Prices as to Commodities Which Are Not Affected With a Public Interest.

The right of an owner to fix the price at which his property may be sold is an inherent attribute of the property itself which is protected by the due process clause of

the Fourteenth Amendment. While in certain limited classes of businesses and commodities which have been held to be of paramount public concern, *i. e.*, affected with a public interest, price-fixing legislation has been upheld, the right to fix the prices for which ordinary commodities of trade and commerce are sold—in the present case, face powder, lipstick and rouge—has been consistently denied by the decisions of this court. Even in those rare instances where the right to fix prices has been recognized, the price fixing agency has always been either the legislature, or some state commission or other body; it has never been recognized that such power may be vested, as it is by the present statute, in private individuals.

(C) In Its Practical Operation the Statute Fixes Prices and It Is Immaterial That It Is Not Aimed Primarily at Price Fixing.

The fact, if it be a fact, that the Fair Trade Act is not aimed at price fixing, but seeks to regulate an allegedly unfair trade practice, does not render it immune from the application of the principles stated in "(B)" above. The substance of the law, its actual effect and the consequences of its operation, these are the criteria by which the law must be judged. Since in its actual functioning it operates to fix the price at which a merchant may sell his own property, it is indubitably a price fixing statute, regardless of any purpose or motive which may be ascribed to the legislature in bringing about its enactment.

(D) The Fact That the Legislation Affects an Entire Class of Articles Rather Than a Single Article Does Not Justify the Enactment.

The fact that the Fair Trade Act fixes prices as to an entire class of commodities rather than a single commodity cannot remove it from the ban of price fixing legislation. If anything, such characteristic, by which the law is made to apply to the tens of thousands of ordinary commodities which are the subjects of retail trade, renders the statute more obnoxious to the rule which prohibits such price fixing than if the statute were confined to a single commodity.

(E) The Decision in Nebbia vs. New York Has Not Overthrown the Doctrine That Price Fixing Is Allowable Only With Respect to Commodities Affected With a Public Interest.

Certain language in the recent decision of this court in *Nebbia v. New York* is strongly relied on in the decision of the State Supreme Court, as evidence of an abandonment by this court of the established distinction which exists between ordinary regulatory legislation enacted under the police power and legislation which seeks to fix the price at which goods may be bought and sold. Appellant submits that the *Nebbia* case does not have and was not intended to have, this effect. The facts in the *Nebbia* case differ so widely from those involved herein as to make it entirely inapplicable to the present case. Properly viewed, that decision is entirely in harmony with the doctrine which confines price fixing legislation to businesses affected with a public interest, as laid down in a long line of decisions of this court.

II.

Section 1½ of the California Fair Trade Act Is Not a Permissible Exercise of the State Police Power.

(A) The Act Deprives Appellant of Valuable Constitutional Rights of Liberty and Property.

The Fair Trade Act not only prevents appellant from disposing of property owned by him and acquired without knowledge of any price restrictions imposed by the manufacturer, for such prices as he desires, but also prevents him from freely contracting for the acquisition of property free from any restrictions as to its resale price. Thus the act deprives appellant of both liberty and property rights.

(B) Section 1½ of the Fair Trade Act Does Not Bear a Reasonable Relation to a Proper Legislative Purpose.

1. *It Is Not Confined in Its Scope and Operation to the Alleged Evil of Predatory or Unfair Price Cutting.*

Even though it be viewed, not as price fixing legislation but as a law enacted under the state police power, the act is unconstitutional in that it is not confined to the evil which it seeks to prohibit. If there is any evil which may be claimed to exist in price cutting of standard brand merchandise, it obviously does not extend to *all* price competition as to such commodities, but only to certain forms of price competition, such as injurious forms of "loss leader" advertising, malicious price cutting, etc. It is common knowledge, however, that there are many instances of price competition which are not of such character. More efficient business methods, merchandis-

ing economies, advantages in location, etc., may enable a merchant, without engaging in any practice which may be described as unfair, to sell commodities at a lower price than his competitor and still make the same, or even a greater profit. Regardless of the legislature's authority under the police power to prohibit price cutting in certain of its extreme or injurious forms, clearly it has no power under the constitution to prohibit, as does the present act, *all price competition* irrespective of its nature.

2. *The Unreasonable Scope of the Law Is Not Justified by Any Alleged Difficulty Which May Be Claimed to Exist, in Devising or Enforcing a Proper Statute.*

The statute is not justified by any alleged difficulty which may be claimed to exist, in devising legislation which is appropriately limited to the real evil sought to be remedied. Such difficulty is not ground for suppressing such evils by arbitrary and unreasonable methods which are precluded by the constitution. The problem of effectively dealing with claimed evils existing in certain forms of price cutting is one for legislative ingenuity to solve, and it is not permissible for the legislature to avoid this responsibility by the crude device of prohibiting all price competition.

3. *The Fact That the Law Prohibits Ordinary, Legitimate, Price Competition Cannot Be Justified by Any Alleged Injury Which May Be Claimed to Result From Such Competition.*

Any attempt to prohibit price competition which is innocent, honest, fair and free from any recognized specie of commercial overreaching, which, in brief, is consistent with the accepted norms of business ethics as practiced

act to enforce against him. A conspicuous instance of this arbitrary operation of the act is found in the fact that under it a retailer may be prevented by a competitor from selling an item at the very price fixed in his own contract with the manufacturer. Again, since the enforcement of the act is in the hands of private individuals, certain retailers who violate the act may be punished while more favored merchants may be permitted to cut prices with impunity. Also, the failure of the act to provide any means by which retailers may ascertain the validity of the price fixing contracts to which they are required to conform, or for notice of the making of any downward price changes therein, keeps appellant constantly in the dark as to the prices which he may charge. Such power of arbitrary and discriminatory application which the statute places in the hands of private persons, violates the first principles of due process of law.

III.

The Statute Is Ambiguous, Indefinite and Unintelligible and for These Reasons Void.

The right conferred by the Fair Trade Act to control resale prices is limited to those commodities which are "in fair and open competition with commodities of the same general class produced by others". These conditions are, therefore, the standards which mark and define the limits of permissible price competition under the statute. Proof of their existence in a given case constitutes a condition precedent to a recovery therein.

Appellant contends that the expressions "fair and open competition" and "general class" have no established meaning at common law. The definition of "fair competition" at common law implies the absence of certain well recognized unfair trade practices on the part of individuals. The term "fair and open competition", as used in the act, is not only broader in scope, but relates, not to the conduct of any given individual, but to some quality of the commodity itself as it passes through the hands of thousands of wholesalers and retailers, the acts of any one of whom may constitute the commodity, *pro tanto* at least, in unfair competition with other commodities. Under these circumstances it would be utterly impossible for a merchant, even if he could attach an intelligible meaning to the expression "fair and open competition with commodities of the same general class" to determine whether such condition existed at any particular time, with respect to a given commodity. The term "general class" is, of course, utterly devoid of definite meaning. Since neither of these terms is given any definition by the act, since they have no special meaning known to the parties required to use them, since they have no known meaning at common law, and since, even if they had a definite meaning, the task of applying such a test would be beyond the ability of the average retailer, they must be rejected as being too uncertain, indefinite and ambiguous to constitute proper statutory standards. Without them the act itself becomes crippled beyond recognition and must, therefore, be stduck down.

ARGUMENT.

I.

Section 1½ of the California Fair Trade Act Is Unconstitutional in That It Authorizes Price Fixing as to Commodities Not Affected With a Public Interest.

(A) Section 1½ of the California Fair Trade Act Is a Price Fixing Statute.

Section 1½ of the California Fair Trade Act authorizes any maufacturer or distributor of the commodities therein referred to, by the simple expedient of entering into a contract prescribing its minimum resale price, to enforce such restriction on all persons having knowledge thereof. Any departure from the price set forth in such contract, knowingly made, constitutes a statutory tort of unfair competition. Thus the effect of the statute is to authorize price fixing at the mere edict of private individuals, with reference to a wide field of commodities. In fact, not being limited to trademarked goods, but, extending as it does, to any commodity which bears, or the label or content of which bears, the "trademark, brand, or name of the producer or owner", the statute necessarily includes within its scope almost the entire sphere of consumers' goods. It is common knowledge today that nearly all articles sold to the public, with the possible exception of some bulk goods, either bear the trademark or brand of the producer, or, at the very least, there may be found somewhere upon them or upon the container or package in which they are sold, the *name* of the manufacturer. By the explicit language of the statute, the latter is sufficient to bring the commodity within the provisions of the

act. Thus the statute is all-embracing, authorizing and inviting price fixing throughout the entire field of retail trade. Since it imposes such fixed prices on non-contracting third parties, regardless of their own volition, it is essentially and intrinsically a price fixing law.

(B) SECTION 1½ OF THE CALIFORNIA FAIR TRADE LAW FIXES PRICES AS TO COMMODITIES WHICH ARE NOT AFFECTED WITH A PUBLIC INTEREST.

It would appear to be a work of supererogation for appellant to elaborately argue before this Honorable Court, the oft stated, and by this time firmly established, proposition, that price fixing legislation of the character here involved, is valid only when it deals with a business which is devoted to a public use, or concerns commodities which have arisen to such high public importance, or become of such deep public concern, that it can properly be said of them that they have become "affected with a public interest". The origin, development, scope and application of the rule may be traced through the following decisions:

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77;

Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 12 S. Ct. 468;

German Alliance Insurance Co. v. Kansas, 233 U. S. 389, 58 L. ed. 1011, 34 S. Ct. 612;

Block v. Hirsh, 256 U. S. 135, 65 L. ed. 865, 41 S. Ct. 458, 16 A. L. R. 165;

Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 67 L. ed. 1103, 43 S. Ct. 630, 27 A. L. R. 1280;

Tyson v. Banton, 273 U. S. 418, 71 L. ed. 718, 47 S. Ct. 426, 58 A. L. R. 1236;

Ribnik v. McBride, 277 U. S. 350, 72 L. ed. 913, 48 S. Ct. 545, 56 A. L. R. 1327;

Williams v. Standard Oil Company, 278 U. S. 235, 73 L. ed. 289, 49 S. Ct. 115, 60 A. L. R. 596;

New State Ice Co. v. Liebmann, 285 U. S. 262, 76 L. ed. 747, 52 S. Ct. 371;

Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A. L. R. 1469.

Rather than burden this court with lengthy quotations from the above decisions, it will be enough, we think, to set forth the following propositions for which they stand.

1. The right of an owner to fix a price at which his property may be sold is an inherent attribute of the property itself, forming one of the highest incidents of its ownership. For this reason, interference with this right is not justified by circumstances which would permit other forms of police regulation.

Tyson v. Banton, supra;

Ribnik v. McBride, supra.

2. The significant requirement to establish that a business is affected with a public interest is that it must be such or be so employed as to justify the conclusion that it has been *devoted* to a public use and its use thereby, in effect, *granted* to the public.

Tyson v. Banton, supra;

Ribnik v. McBride, supra.

3. The common callings are in no sense devoted to a public use and the sale of ordinary commodities of food, clothing and the like are not affected with a public inter-

est so as to warrant the fixing of the prices which may be charged therefor.

Wolff Packing Co. v. Court of Industrial Relations, supra;

Williams v. Standard Oil Co., supra;

New State Ice Co. v. Liebmann, supra.

4. Subject to regulation in the prices they may charge the public as being a business devoted to a public use, or as related to commodities "affected with a public interest", are grain elevators (*Munn v. Illinois, supra*), insurance (*German Alliance Insurance Co. v. Kansas, supra*), housing as a wartime emergency measure (*Block v. Hirsh, supra*), and the sale of milk as a temporary emergency (*Nebbia v. New York, supra*). On the other hand, the fixing of prices in numerous basic industries, such as food, clothing, transportation, etc., in order to secure continuity in such industries (*Wolff Packing Co. v. Court of Industrial Relations, supra*), the sale of theatre tickets (*Tyson v. Banton, supra*), gasoline (*Williams v. Standard Oil Co., supra*), and ice (*New State Ice Co.* v. *Liebmann, supra*), are not so vital to the public welfare as to warrant price fixing in such businesses.

5. The mere fact that the legislature declares a business to be affected with a public interest is not determinative of the issue. The matter is always open to judicial inquiry.

Wolff Packing Co. v. Court of Industrial Relations, supra;

Tyson v. Banton, supra.

(Note that in the present case there is no such legislative declaration.)

6. While there is no closed category of businesses which are, or may be, clothed with a public interest, (*Nebbia v. New York, supra,* 291 U. S. at p. 536), nevertheless, any business sought to be controlled in respect to the prices which may be charged, must fall into one of three categories. These are defined in *Wolff Packing Co. v. Court of Industrial Relations, supra,* as follows: (262 U. S. at p. 535)

> "(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities.
>
> "(2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or Colonial legislatures for regulating all trades and callings. Such are those of keepers of inns, cabs and gristmills. State v. Edwards, 86 Me. 102; Terminal Taxicab Co. v. District of Columbia, 241 U. S. 252, 254.
>
> "(3) Businesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly."

Further discussion of the rule is unnecessary. Palpably, the almost unlimited field of commodities to which the Fair Trade Act applies, are not within any of the catagories above set forth and in no sense constitute commodities which are affected with a public interest. To say that all commodities which bear the trademark, brand or name of the producer or owner may be subject to price fixing in the manner permitted by the present legislation, is to say that the price of everything, from a safety pin to a steam yacht, may be fixed by the legislature. This, as was said in *Wolff Packing Co. v. Court of Industrial Relations, supra* (262 U. S. at p. 539), would be

> "running the public interest argument into the ground."

If food and clothing (*Wolff Packing Co. v. Court of Industrial Relations, supra*), gasoline (*Williams v. Standard Oil Co., supra*), theatre tickets (*Tyson v. Banton, supra*), and ice (*New State Ice Company v. Liebmann, supra*), are not of such vital public concern as to constitute them affected with a public interest, *a fortiori* the commodities involved in the instant case, i. e., face powder, rouge and lipstick [Tr. of Record, p. 13], are not of such grave public concern as to bring them within the class of commodities affected with a public interest. Equally self-evident is it, that appellant's business, that of a retail druggist, is not of such high public importance as to stamp it as one devoted to a public use. It must be pointed out here, that in all cases in which price fixing has received judicial sanction, the prices were fixed by the state itself or by some governmental agency exercising the legislative power of the state. In the instant case, the prices to which a non-contracting retailer is required

to submit are imposed, not by a state agency, but by the *ipse dixit* of private individuals.

The mere statement of the foregoing propositions should suffice to establish the Act's invalidity. Appellant, therefore, refrains from further laboring the point.

The majority opinion of the state court in the within cause, attempts to extricate the present case from the force of appellant's contention, by means of the following arguments: (1) that the statute does not aim primarily at regulating prices but at protecting the property and contract rights of manufacturers; (2) that assuming that it does fix prices, it escapes criticism because it regulates an entire class of articles rather than a single article; and (3) that by its recent decision in the *Nebbia* case, this court has abandoned the long established principle which requires as a prerequisite for permissible price fixing, that a business must be of fundamental public concern and has adopted, instead, the rule that if the articles involved are subject, at all, to regulation under the police power, then their purchase and sale does affect the public interest so as to warrant the fixing of prices therein. We shall consider briefly these contentions:

(C) In Its Practical Operation, the Statute Fixes Prices, and It Is Immaterial That It Is Not Aimed Primarily at Price Fixing.

The fact, if it be a fact, that Section 1½ of the Fair Trade Act is not aimed at fixing prices but has as its alleged purpose the regulation of certain allegedly unfair trade practices, obviously does not save the statute from constitutional objection if, in fact, it is a price fixing enactment. To hold otherwise would be to substitute the motives of the legislature, for the practical consequences

of the legislation. If it be assumed that the regulation of prices was not the main purpose of this legislation but rather the protection of the good will of a producer or a manufacturer, it does not follow that such protection may be achieved in a manner contrary to the constitutional rights of a citizen to freely deal with his property.

Wolff Packing Co. v. Court of Industrial Relations, supra;

Tyson v. Banton, supra;

Williams v. Standard Oil Company, supra.

If the normal operation of the act involves the fixing of prices, it is manifestly a price fixing statute and its validity must be judged entirely by the constitutional cannons applicable to this type of legislation. Thus in *Tyson v. Banton, supra,* the object of the act involved, was not to fix prices, but to safeguard the public against fraud, extortion, exhorbitant rates and similar abuses in the sale of theatre tickets. Again, the avowed object of the act involved in *Wolff Packing Co. v. Court of Industrial Relations, supra,* was not to fix wages, but to secure continuity of food, clothing and fuel supply in the state. Yet in both of these cases and in numerous others of similar import which might be cited, it was held that irrespective of the *purpose* or *object* of the act involved, if, in fact, it operated to fix or control prices in a business not affected with a public interest, it was invalid. Similarly here, the fact that in actual operation the statute authorizes strangers to fix the price at which appellant may sell his own property and is therefore price fixing legislation, is not dissolved by the alchemy of a different legislative intent, but remains an insuperable bar to its validity.

(D) THE FACT THAT THE LEGISLATION AFFECTS AN ENTIRE CLASS OF ARTICLES RATHER THAN A SINGLE ARTICLE DOES NOT JUSTIFY THE ENACTMENT.

In attempting to surmount the rule which requires that before prices may be regulated, a business must be of the utmost public concern, i. e., "affected with a public interest", the majority opinion of the state court recites (91 Cal. Dec. at p. 355):

> "It may be that when the Legislature attempts to regulate the price of a particular commodity, in order to justify classifying that article differently from other commodities, its purchase and sale must affect the public interest. But here the legislation affects an entire class of articles, which class, as will later appear, is reasonably the subject of classification."

Appellant contends that the fact that the Fair Trade Act deals not with a single commodity but with an entire class of commodities, does not militate against the established rules of law which prohibit price fixing in a business not affected with a public interest. If anything, the rule is contrary; courts display greater reluctance to permit price fixing in a case involving a class of goods or businesses, rather than a single one. Thus the right to fix prices has been recognized in the case of a single business which, because of a public emergency, was found to be affected with a public interest, and has been denied in an instance involving an entire class of businesses where the requirement of imminent public concern was absent.

Compare:

Nebbia v. New York, supra;

Wolff Packing Co. v. Court of Industrial Relations, supra.

Clearly the objection that the commodities here involved are not "affected with a public interest", cannot be hurdled by the assertion that the present case deals with an entire class of goods rather than a single one. In either situation there must appear the grave public concern which has always been held to be a necessary prerequisite to the validity of this type of regulation and which is totally absent in the class of commodities to which the Fair Trade Act applies.

(E) The Decision in Nebbia v. New York Has Not Overthrown the Doctrine That Price Fixing Is Allowable Only With Respect to Commodities Afected With a Public Interest.

In support of its interpretation of the decision in the *Nebbia* case, as constituting a complete about face by this court in its view point toward price fixing legislation, the state court quotes the following excerpt from the *Nebbia* case (91 Cal. Dec. at pp. 355, 356):

> " 'Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. Thus understood, "affected with a public interest" is the equivalent of "subject to the exercise of the police power"; and it is plain that nothing more was intended by the expression.' "
>
> *Nebbia v. New York,* 291 U. S. at p. 533.

It will be conceded, we think, that prior to the appearance of the above language, the entire tenor of judicial opinion repudiated the view that the doctrine of "affected

with a public interest" was the exact equivalent of "police power".

Munn v. Illinois, supra;

Wolff Packing Co. v. Court of Industrial Relations, supra;

Ribnik v. McBride, supra;

Tyson v. Banton, supra.

Although the language above quoted when completely isolated and removed from the factual situation in connection with which it was used, might be contended to support the conclusion reached by the state court upon this point, appellant is of the view that it was not intended to have this result. On the contrary, appellant submits that the language quoted must be interpreted in the light of the facts and of the historical background present in that case, which warranted the conclusion that the milk industry of New York was of sufficient public concern to constitute it a business "affected with a public interest" and warrant price fixing as a *temporary* measure. This court has already remarked that the New York Milk Control Act was "a temporary expedient".

Borden's Farm Products Co., Inc. v. Ten Eyck, ... U. S. ....., 80 L. ed. 469, 56 Sup. Ct. Rep. 453.

The distinctions between the facts present in the *Nebbia* case and the circumstances of the within case are marked and numerous. There, the subject of regulation, the milk industry, dealt with a staple and essential element of diet, involving a matter of public health (291 U. S. at pp. 516, 517); the industry itself was a paramount one in the

state and was closely bound up with its economic and financial life (291 U. S. at p. 517); the industry had been subjected to legislation of every character for many years (291 U. S. at pp. 521, 522); the act was effective only for a limited time and the court found that a great economic emergency existed (291 U. S. at pp. 515, 516, 517, 518 and footnote at pp. 518, 519); the act contained detailed findings of fact as to the grave domestic conditions which warranted the particular legislation (291 U. S., footnote at pp. 518, 519); the prices were fixed by an administrative board whose decisions were subject to judicial review (291 U. S., footnote at p. 520).

In the present case the subject of regulation does not involve public health; it is not a paramount one in the state; it is in nowise bound up in its financial or economic life; the commodities have never before been subject to any extensive regulation; the act contains no detailed, or any, findings of fact as to the conditions which warrant the legislation; the act is not temporary but permanent in character, and the prices are fixed, not by an administrative board with provision for judicial review but by the arbitrary edict of private individuals whose decisions are final. It would be hard, indeed, to find two decisions more dissimilar in their facts.

It is well to recall here the warning which was sounded by this court in *Tyson v. Banton, supra*, against invoking the abstract language contained in one decision as authority for another case involving different facts. In re-

ferring to its decision in *German Alliance Insurance Co. v. Lewis,* 233 U. S. 389, 58 L. ed. 1011, 34 Sup. Ct. Rep. 612, which decided that insurance companies were "affected with a public interest", the court quoted the following language from that case (273 U. S. at p. 436):

> "'And both by the expression of the principle and the citation of the examples we have tried to confine our decision to the regulation of the business of insurance, it having become "clothed with a public interest," and therefore subject "to be controlled by the public for the common good."'"

The court then added (273 U. S. at p. 473):

> "This observation fairly may be regarded as a warning at least to be cautious about invoking the decision as a precedent for the determination of cases involving other kinds of business."

Moreover, since its decision in the *Nebbia* case, this court in *Morehead v. Tipaldo,* ..... U. S. ....., 80 L. ed. 921, 56 S. Ct. 918, has cited with approval several of its outstanding decisions upholding the doctrine of "business affected with a public interest".

Appellant, therefore, does not view the *Nebbia* case in the revolutionary light in which it is pictured by the California Supreme Court, but rather as a single additional instance, circumscribed by its own unique facts, to be added to those cases already recognized, wherein, by the judicial process of exclusion and inclusion, the concept of business affected with a public interest is being gradually defined and developed.

Appellant is aware that the doctrine of a "business affected with a public interest" has not gone without criticism.

> Dissenting Opinions of Stone, J. and Holmes, J. in *Tyson v. Banton, supra* (273 U. S. at p. 447) and of Holmes, J., Brandies, J. and Stone, J. in *Ribnik v. McBride, supra* (277 U. S. at p. 359);
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> 39 *Yale Law Journal,* No. 8 (June, 1930), at p. 1089.

That it offers, at best, an indefinite standard for determining those businesses in which price fixing is permitted, has been recognized by this court. But such recognition has been made in decisions which have uniformly used it as a criterion.

> *Tyson v. Banton, supra;*
>
> *Wolff Packing Co. v. Court of Industrial Relations, supra;*
>
> *Ribnik v. McBride, supra.*

As stated in the last mentioned case (277 U. S. at p. 355):

> "As was recently pointed out in Tyson & Bro.-United Theatre Ticket Offices v. Banton, 273 U. S. 418, 430, the phrase is not capable of exact definition; *but, nevertheless, under all of the decisions of this court from Munn v. Illinois 94 U. S. 113, it is the standard by which the validity of price-fixing legislation, in respect of a business like that here under consideration, must be tested.*" (Italics added.)

In conclusion on this branch of the case, appellant submits that while, as said in the *Nebbia* case, there is nothing sacrosanct about price fixing which entirely removes it from the sphere of legislative action, and while under appropriate conditions the legislature may regulate a business by fixing prices, as well as in other respects, nevertheless the historical distinction between these two types of legislative control has not been destroyed by the *Nebbia* case, and the quoted language from that decision was not intended to, and cannot, be lifted bodily out of the factual context in connection with which it was used and placed in juxtaposition with the entirely different factual situation existing in the present case as constituting a precedent for the validity of the statute; that the law is, today, as it has always been, that before legislative interference with the price a man may charge for his property can be justified, extraordinary circumstances must exist which create a uniquely intimate relation between that business and a public interest which is of a paramount concern to the state.

Since the facts of the present case are similar to those involved in *Wolff Packing Co. v. Court of Industrial Relations, supra, Tyson v. Banton, supra,* and *Williams v. Standard Oil Company, supra,* and are clearly dissimilar from those involved in the *Nebbia* case, it is governed by the former decisions and not the latter, and, so governed, the conclusion becomes inescapable, that the present legislation attempts to fix prices with respect to commodities which are not affected with a public interest and, therefore, violates the due process provisions of the 14th Amendment.

II.

Section 1½ of the California Fair Trade Act Is Not a Permissible Exercise of the State Police Power.

(A) The Act Deprives Appellant of Valuable Constitutional Rights of Liberty and Property.

The Fair Trade Act not only prevents appellant from disposing of property owned by him and acquired without knowledge of any price restrictions imposed by the manufacturer, for such price as he desires, but also prevents him from freely contracting for the acquisition of property free from any restrictions as to its resale price. Thus the act deprives appellant of both liberty and property rights. As to property acquired by appellant before notice of the resale price was given, any subsequently imposed restrictions on the *jus disponendi* is violative of appellant's property rights. The right of appellant to fix the price at which he may sell his property is protected by the due process of law provisions of the 14th Amendment. As stated in *Tyson v. Banton, supra* (273 U. S. at p. 429):

> "* * * The right of the owner to fix a price at which his property shall be sold or used is an inherent attribute of the property itself (Case of the State Freight Tax, 15 Wall, 232, 278, 21 L. ed. 146, 162) and, as such, within the protection of the due process of law clauses of the Fifth and Fourteenth Amendments."

And the right of unrestricted alienation is one of the essential incidents of a right of general property in movables.

> *Dr. Miles Medical Co. v. John D. Parke & Sons,* 220 U. S. 373, 55 L. ed. 502, 31 S. Ct. 376.

But no less entitled to protection is appellant's liberty of contract which includes his right to acquire property upon such terms and free from such restrictions as he may agree with the seller.

Algeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 S. Ct. 427;

Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 S. Ct. 277;

Meyer v. Nebraska, 262 U. S. 390, 67 L. ed. 1042, 43 S. Ct. 625, 29 A. L. R. 1446;

Fairmont Creamery Co. v. Minnesota, 274 U. S. 1, 71 L. ed. 893, 47 S. Ct. 506, 52 A. L. R. 163;

Adkins v. Children's Hospital, 261 U. S. 525, 67 L. ed. 735, 43 S. Ct. 394, 24 A. L. R. 1238;

Morehead v. Tipaldo, ... U. S. ....., 80 L. ed. 921, 56 S. Ct. 918.

The statute here involved deprives appellant of both of these rights and, in addition, *ex proprio vigore* compels him, willingly or not, to be a party to a price fixing contract made between third parties. Thus there can be no question but that the statute deprives appellant of valuable constitutional rights.

Viewed as price fixing legislation, as appellant submits it must be viewed, it has already been pointed out herein that the requisite conditions for sustaining the statute are totally absent from the case. Assuming that it is to be considered, not as price fixing legislation but rather as an attempt, pursuant to the state police power, to regulate an allegedly unfair trade practice, which was the view taken by the state court, it still falls far short of meeting the requirements of such legislation.

To sustain the statute on this ground it must appear that the law bears a real and substantial relation to a proper legislative purpose, i. e., there must appear a clear connection between the assumed purposes of the act, viz.: the public health, morals, safety or general welfare, and the actual provisions thereof. In addition, it must not be arbitrary or discriminatory in nature. These essentials are well stated in *Nebbia v. New York, supra* (291 U. S. at p. 537), as follows:

> "If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio.*"

To the same effect are numerous decisions of this court.

Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 S. Ct. 499;

Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 S. Ct. 539;

Nectow v. City of Cambridge, 277 U. S. 183, 72 L. ed. 842, 48 S. Ct. 447;

Meyer v. Nebraska, 262 U. S. 390, 67 L. ed. 1042, 43 S. Ct. 625, 29 A. L. R. 1446;

Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 46 L. ed. 679, 22 S. Ct. 431;

Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 S. Ct. 18;

Louis K. Liggett Co. v. Baldridge, 278 U. S. 105, 74 L. ed. 204, 49 S. Ct. 57.

Appellant will demonstrate herein that the Fair Trade Act utterly fails to meet these requirements and that, therefore, it is not a permissible exercise of the state police power.

(B) SECTION 1½ OF THE FAIR TRADE LAW DOES NOT BEAR A REASONABLE RELATION TO A PROPER LEGISLATIVE PURPOSE.

1. *It Is Not Confined in Its Scope and Operation to the Alleged Evil of Predatory or Unfair Price Cutting.*

The title of the Fair Trade Act states its purpose as follows:

> "An Act to protect trademark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trademark, brand or name."

The body of the act is much broader in scope and in effect prohibits *all price competition* as to any commodity which bears, or the label or content of which bears, the trademark, brand or name of the producer or owner of such commodity, and which is in fair and open competition with commodities of the same general class produced by others.

However, a reference to the complaint herein, as well as to the general literature on the subject, discloses, that if there is any evil in retail price competition with respect to the type of commodities above referred to, it does not inhere in price competition *per se*. Rather, it is certain forms of price cutting, i. e., destructive, unfair or "predatory" price cutting, or the use or abuse of so-called "leader" advertising or "loss leaders" which, it has been contended, has injurious consequences. [Tr. of Record, p. 7, Paragraph XII of Complaint.]

> Report of Federal Trade Commission on Resale Price Maintenance, Part II, pp. 4, 9 and 165;
>
> Federal Trade Commission: Report on Chain Store Leaders and Loss Leaders, Senate Document No. 51, 72nd Congress, 1st Session;

Haring: Retail Price Cutting (1935) pp. 4-5, pp. 191-192;

Seligman & Love: Resale Price Maintenance (1932) at pp. 268-269; 342;

Tosdal: Price Maintenance, Vol. 3, American Economic Review (1918) at p. 30;

National Industrial Conference Board: Public Regulation of Competitive Practices (1929) at pp. 91-92; 96-97;

46 Harvard Law Review, (May 1933) 1195;

5 Fordham Law Review, No. 1 (Jan., 1936) p. 50;

36 Columbia Law Review, No. 2 (Feb., 1936), pp. 293, 294.

These are matters of general business knowledge of which this court may take judicial knowledge.

Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 S. Ct. 324;

New Jersey Asbestos Company v. Federal Trade Commission (C. C. A.), 264 Fed. 509, 18 A. L. R. 546.

Without attempting to determine to what extent these objectives are proper matters for legislative control, it is enough to assume for the moment, that certain forms of price cutting on standard brand merchandise may be curbed by statute. However, it is equally clear that any and all price competition, or price competition *per se,* even though confined to the class of commodities referred to in the present act, is not harmful to the public welfare. Consequently, any legislation which, though aimed at the former, actually accomplishes the latter, is beyond the

purview of legislative control. A state may not, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable or unnecessary restrictions upon them.

Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 S. Ct. 499;

Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 S. Ct. 539;

Louis K. Liggett & Co. v. Baldridge, 278 U. S. 105, 73 L. ed. 204, 49 S. Ct. 57;

Meyer v. Nebraska, 262 U. S. 390, 67 L. ed. 1042, 43 S. Ct. 625, 29 A. L. R. 1446;

Burns Baking Co. v. Bryan, 264 U. S. 504, 68 L. ed. 813, 44 S. Ct. 412, 32 A. L. R. 661;

Washington v. Roberge, 278 U. S. 116, 73 L. ed. 210, 49 S. Ct. 50;

Weaver v. Palmer Bros. Co., 270 U. S. 402, 70 L. ed. 654, 46 S. Ct. 320.

It is the duty of the court to determine whether the challenged provisions have a real and substantial relation to a proper legislative purpose.

Meyer v. Nebraska, supra;

Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169;

Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 46 L. ed. 679;

Lawton v. Steele, supra;

Lochner v. New York, supra;

Nebbia v. New York, supra.

And while the general wisdom of the law is not before the court, the determination of such limits of permissible restriction is essentially a judicial question.

Dobbins v. Los Angeles, supra;
Connolly v. Union Sewer Pipe Co., supra;
Lochner v. New York, supra.

The restriction of rights to an extent greater than is required by any perceptible end is violative of the above rules.

Nectow v. City of Cambridge, 277 U. S. 183; 72 L. ed. 842, 48 S. Ct. 447;

Schlesinger v. Wisconsin, 270 U. S. 230, 70 L. ed. 557, 46 S. Ct. 260;

Fairmont Creamery Co. v. Minnesota, 274 U. S. 1, 71 L. ed. 893, 47 S. Ct. 506;

Tyson v. Banton, supra;

Louis K. Liggett Co. v. Baldridge, supra;

Weaver v. Palmer Bros. Co., 270 U. S. 402, 70 L. ed. 654, 46 S. Ct. 320;

Varney & Green v. Williams, 155 Cal. 318, 100 Pac. 867.

An iniquitous feature of the statute here involved, indeed, perhaps its most egregious fault, is that it totally ignores the limits of permissible police regulation laid down in the above decisions. As to any manufacturer of the commodities referred to in the act who desires to take advantage of its provisions, it declares *all price competition as to his product unfair competition.* It

blandly asserts that the mere fact that one retailer sells such an article for less than his competitor, *ipso facto* is unfair competition. It is not concerned with the particular *kind* of price competition that exists in any individual case. The existence or non-existence of a malicious intent to injure competition; the existence of real as distinguished from simulated competition; the use of leaders, loss leaders or sales below cost; the fraudulent "switching" of brands in connection with "loss leader" advertising; whether the price competition is temporary and predatory in nature or whether it is permanent and legitimate; with all these factors it concerns itself not. They are, indeed, entirely irrelevant and immaterial to making out a case under the statute. This is done by merely proving that a sale of a commodity has been knowingly made at less than the resale price fixed by the manufacturer in any contract with a third person.

This mere statement of the scope of the act should be sufficient to impel the conclusion that it utterly fails to meet the requisites for its validity as above laid down, in that it imposes restriction on personal and property rights in the sale of commodities, which can have no conceivable relation to any recognized commercial evil. The act states, in effect, that all price competition is unfair competition and, therefore, unlawful. Common knowledge tells us otherwise. Lower rental, more competent employees, more efficient management, purchases with cash discounts, close proximity to buying and manufacturing centers, aggressive advertising, skillful utilization of

display space—these, and a host of other elements, may enable a retailer to sell his goods at a uniform reduced price and still make a reasonable profit. A striking example of this practice is cited in Professor Haring's recent work, "Retail Price Cutting". (pp. 13-14):

> "There is in the city of New York one department store, R. H. Macy and Company, especially noted for its price cutting. In justification of this practice, the store asserts that it conducts its business more efficiently than the majority of its competitors, that it has developed and does exercise economies which other stores lack. For example: (1) It gives to customers no credit accommodations. Every sale is a sale for cash. Hence no losses are suffered through bad debts, idle book capital, and the expense of large accounting and collecting departments. (2) In the variety and quality of goods, and in their display, it believes it has another advantage. (3) Its salesclerks are of a high order of ability: they obtain an unusually high percentage of possible sales and make for satisfied customers and a very small proportion of returned goods. (4) It buys goods in large quantities, and pays cash, thus securing the benefits of both cash and quantity discounts. Many of its goods are bought directly from the factory. The prices for goods do not include any middlemen's profits. (5) It advertises wisely and on a large scale, and has developed a volume of business which in proportion to the capital employed is far greater than the average. Such rapidity of turnover can easily bear heavy price cutting. For even though the margin of profit on each turnover be small, a sufficient number of turnovers will in the long run guarantee large profits."

The author continues:

"Chain stores not only lay claim to these same economies, but, in addition, many make no deliveries. Some, indeed, go so far as to compel the customer to do his own selecting of goods and are known as 'self-service' stores."

"In the large retailing organizations, there are apparent the beginning of a scientific system of training men for managerial positions of all grades. These new courses include instruction in modern merchandising, sales management, advertising, display of goods, and sales psychology. Management efficiency may therefore be expected to increase in the future with attendant lowered costs."

"There are many stores in existence which claim the advantage of low rents, and low wage expenditures. Still others enjoy close proximity to buying and manufacturing centers, and hence save on transportation charges."

"Such instances could be multiplied indefinitely. Those given are sufficient, however, to make clear that *many stores do exist which through peculiarly advantageous economies enjoyed by them are able to sell their goods—not one item, nor yet only a few goods of the standard trade-marked variety, but all their goods—at a uniform cut price, and yet derive reasonable profits. In such cases there is undoubtedly a sound economic justification for price cutting.*" (Italics added.)

Thus, by the judicious buying of goods and selection of stock, by skillful window display, by attractive advertising, by wise pricing of his goods, by honesty and reliability in his dealings with the public, by advantage in location and rental, by prudence in giving credit accom-

modations, by the employment of well trained efficient salesmen, and other similar economies, a druggist may be able to reduce his cost of business to a point possibly ten per cent below the cost of the average druggist. As a result, he may be able to sell, not only Max Factor face powder, but all of his goods, at a lesser price than his competitor and still make as great a profit. Rather than pocketing the extra profit he may prefer to build up a good will by sharing these merchandising economies with his customers through reduced prices. The Fair Trade Act prohibits him from exercising this right.

Again it is generally recognized that there is a wide difference in the cost of doing business among retailers, depending upon the type of service rendered, *i. e.*, whether cash and carry or delivery, credit, etc.; types of organization, *i. e.*, whether mail order, chain store, department store, specialty shop, etc., and also among retailers of different types handling the same merchandise.

Report of Federal Trade Commission on Resale Price Maintenance, Part II, pp. 2-3, 4-5 and 84-122;

15th Census of the United States: Distribution, Vol. 1, pp. 21-25;

Haring: Retail Price Cutting (1935), pp. 18-20; 36; 41;

Seligman & Love: Resale Price Maintenance, pp. 341-342;

National Industrial Conf. Board: Public Regulation of Competitive Practices (1929), at pp. 94-95;

Stevens: Resale Price Maintenance as Unfair Competition: 19 Col. Law Review, No. 4, pp. 265, 269 (June, 1919).

As stated by Professor Haring (p. 41):

> "Costs of doing retail and wholesale business differ between types of outlets (grocery and drug stores), between types of stores in the same general classification (chain and independent grocery stores), and between individual stores (efficient and inefficient independent grocery stores). The manufacturer, therefore, must expect his trade-marked merchandise to be sold to consumers at differing prices if he has complete distribution. This will be the case if each and every retail outlet sets a price upon the product which covers costs and allows a reasonable profit."
>
> "To have an identical price charged by every retailer handling the article, a manufacturer would, theoretically, have to limit his outlets to, for example, chain grocery stores of high efficiency, or to independent grocery stores of approximately equal efficiency. Practically, the situation is not so acute, yet *a manufacturer cannot reasonably expect a diversified group of dealers to charge identical prices even though none of them indulge in predatory price cutting.*" (Italics added.)

It is needless to say that all of the foregoing represent common economic, commercial and business conditions of which this court may take judicial notice.

Muller v. Oregon, supra.

In all of the above cases a retailer may reduce prices on standard brand commodities, not in the form of "loss leaders", not by selling his merchandise below cost, not by the deliberate slashing of prices with the intent to injure his competitor or damage the good will of the manufacturer, not by the fraudulent "switching" of

brands, not by any recognized species of commercial overreaching, but from honest, legitimate, forthright effort. Does the legislature have the power to deprive him of this right? The Fair Trade Law, by failing to discriminate between justifiable and unjustifiable price cutting, by failing to restrict its scope and application to cases in which any recognized evil of unfair dealing could be claimed to exist, says that it does. Numerous decisions of this court categorically deny this contention.

Fairmont Creamery Co. v. Minnesota, 274 U. S. 1, 71 L. ed. 893, 47 S. Ct. 506;

Tyson v. Banton, 273 U. S. 418, 71 L. ed. 718, 47 S. Ct. 426;

Adams v. Tanner, 244 U. S. 590, 61 L. ed. 1336, 37 S. Ct. 662;

Ribnik v. McBride, 277 U. S. 350, 72 L. ed. 913, 48 S. Ct. 545, 56 A. L. R. 1327.

In *Fairmont Creamery Co. v. Minnesota, supra,* there was involved the validity of a statute which prohibited the purchase of commodities at a higher price in one part of the state than in another. The act was overthrown as extending its scope to cases not properly subject to restriction, the court stating (274 U. S. at pp. 8, 9):

> "It seems plain enough that the real evil supposed to threaten the cream business was payment of excessive prices by powerful buyers for the purpose of destroying competition. To prevent this the statute undertook to require every buyer to adhere to a uniform price fixed by a single transaction.
>
> *As the inhibition of the statute applies irrespective of the motive, we have an obvious attempt to destroy plaintiff in error's liberty to enter into normal contracts long regarded not only as essential to the free-*

dom of trade and commerce but also as beneficial to the public. * * *

The real question comes to this—May the state, in order to prevent some strong buyers of cream from doing things which may tend to monopoly, *inhibit plaintiff in error from carrying on its business in the usual way heretofore regarded as both moral and beneficial to the public and not shown now to be accompanied by evil results as ordinary incidents?* Former decisions here require a negative answer. We think the inhibition of the statute has no reasonable relation to the anticipated evil—high bidding by some with purpose to monopolize or destroy competition. Looking through form to substance, it clearly and unmistakably infringes private rights whose exercise does not ordinarily produce evil consequences, but the reverse." (Italics added.)

That evils inherent in objectionable forms of price competition, may be reached by legislation which is properly limited in its scope so as to apply only to those forms of price competition wherein the evil is present, is not denied by this decision, and is affirmed in *Central Lumber Co. v. South Dakota,* 226 U. S. 157, 57 L. ed. 164, 33 Sup. Ct. 66. This case recognizes that price discrimination, committed with an intent to injure competition, is unjustifiable and therefore properly may be the object of remedial legislation.

A similar result was reached in *Tyson v. Banton, supra,* when the New York legislature, being of the opinion that certain frauds were practiced on the public in connection with the sale of theatre tickets, enacted a law prohibiting their resale at a price more than fifty cents in excess of the price printed on the tickets. The statute was sought

to be defended as an appropriate method of protecting the public against extortion, fraud, etc. This court there said (273 U. S. at p. 443):

> "One vice of the contention is that the statute ignores the righteous distinction between guilt and innocence, since it applies wholly irrespective of the existence of fraud, collusion or extortion (if that word can have any legal significance as applied to transactions of the kind here dealt with,—Com. v. O'Brien, 12 Cush. 84, 90), and fixes the resale price as well where the evils are absent as where they are present. *It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrong-doers also may be caught.*" (Italics added.)

Similarly, in *Adams v. Tanner, supra,* it was said (244 U. S. at pp. 594, 595):

> "Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked."

Decisions of the California Supreme Court are in accord in recognizing this limitation on the exercise of the police power.

Varney & Green v. Williams, 155 Cal. 318, 100 Pac. 867;

Pacific Rys. Adver. Co. v. City of Oakland, 98 Cal. App. 165, 276 Pac. 629.

The Fair Trade Law ignores the fundamental line of demarcation between the permissible and the prohibitive in police regulation laid down in the foregoing decisions. In its aim to scotch the unscrupulous and predatory price cutter, it likewise deters the legitimate merchant in his daily endeavor to develop his business by the peaceful and honest use of his skill and industry. In brief, it is but another example of the ineptness of government in trying to deal in universals, with practices that should be dealt with, if at all, only by legislation meticulously drawn so as to confine the punishment which it inflicts to those who are perpetrating the evil.

2. The Unreasonable Scope of the Law Is Not Justified By Any Alleged Difficulty Which May Be Claimed to Exist in Devising or Enforcing a Proper Statute.

The assertion has been made, that granting that the scope of the statute is too broad, justification may be found in the difficulty of pricking out the nice line of demarcation which necessarily exists between fair competition and predatory price cutting. In reply to this contention, it is enough to say, that such difficulty, if it exists, does not justify the adoption of methods which are arbitrary and unreasonable. The deliberate violation of per-

sonal rights and liberties cannot be condoned by legislative disingenuity.

Tyson v. Banton, supra;

Adams v. Tanner, supra;

Schlesinger v. Wisconsin, supra;

Varney & Green v. Williams, supra;

Wolf v. Fuller, 87 N. H. 64, 171 Atl. 193;

Tolliver v. Blizzard, 143 Ky. 773, 137 S. W. 509, 34 L. R. A. (N. S.) 890.

In refuting this very argument in *Tyson v. Banton,* this court said (273 U. S. at p. 445):

> "But the difficulty or even the impossibility of thus dealing with the evils, if that should be conceded, constitutes no warrant for suppressing them by methods precluded by the Constitution. Such subversions are not only illegitimate but are fraught with the danger that, having begun on the ground of necessity, they will continue on the score of expediency, and, finally, as a mere matter of course. Constitutional principles, applied as they are written, it must be assumed, operate justly and wisely as a general thing, *and they may not be remolded by law makers or judges to save exceptional cases of inconvenience, hardship or injustice.*" (Italics added.)

In *Schlesinger v. Wisconsin, supra,* there was involved the validity of an act providing for the imposition of an inheritance tax whenever a transfer was made in contemplation of death. The act provided that every transfer made within six years prior to death and without an adequate consideration was presumed to have been made in contemplation of death. The facts in the case dis-

closed that although the transfers in issue were made within the six year period, actually they had not been made in contemplation of death. The court held the act unconstitutional, making the following observations (270 U. S. at p. 240):

> "The presumption and consequent taxation are defended upon the theory that, exercising judgment and discretion, the Legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, 'A' may be required to submit to an enactment forbidden by the Constitution if this seems necessary in order to enable the State readily to collect lawful charges against 'B.' Rights guaranteed by the Federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever."

The rule is equally well recognized in the state courts. An excellent statement is to be found in *Tolliver v. Blizzard, supra,* where the court said (143 Ky. at p. 776):

> "The test in every case is: Is the prohibition of a particular business or the sale of a particular article necessary to prevent the infliction of a public injury? It is not sufficient that the public sustain harm from a certain trade or employment as it is conducted by some engaged in it. *Because many men engaged in the calling persist in so conducting the business that the public suffers, and their acts cannot otherwise be effectually controlled, is no justification for a law which prohibits an honest man from conducting the business in such a manner as not to inflict injury upon the public."* (Italics added.)

And in *Wolff v. Fuller,* 87 N. H. 64, 174 Atl. 193, the court held unconstitutional a statute imposing restrictions on itinerant storekeepers, but the terms of which statute were broad enough in their application, to restrict the business of temporary storekeepers and others. In reply to the contention that any other type of statute would be ineffective, the court said (174 Atl. at p. 198):

> "The argument that an itinerant vendor may readily escape the regulations of the law by a false claim difficult of disproof that he is a temporary storekeeper furnishes no sufficient reason for imposing the regulations properly made conditions for his engagement in his business upon those not therein engaged. The difficulty of proof is not formidable, and is more assertive than actual. * * * *The fact that status may be difficult of proof does not authorize the Legislature to fix a definition for it which includes many who are not of the class."* (Italics added.)

No excuse can therefore be tendered on the grounds of expediency, for the unwarranted scope of the Fair Trade Act, which, in attempting to strike down the merchant guilty of destructive price cutting, sinks its weapon into the innocent flesh of the honest merchant as well.

3. *The Fact That the Law Prohibits Ordinary, Legitimate, Price Competition Cannot Be Justified by Any Alleged Injury Which May Be Claimed to Result From Such Competition.*

Equally fallible is the contention that, granting that the act is broad enough to apply to price competition which is innocent, honest, fair and free from any recognized specie

of commercial overreaching, as well as to the obnoxious variety, nevertheless, if such competition injures the manufacturer or a competitor, the Legislature, acting, presumably, in the interest of the public, may prohibit it. The flaw in this argument is that it posits as a datum, the assertion that a sufficient public interest to justify the exercise of the police power is to be found in the protection of business men against the risks of ordinary, honest, business competition. This is indeed a strange doctrine, which, it is safe to say, will hardly strike the sympathetic ear of American business men. Into the very warp and woof of the American system of private competitive enterprise has been woven a recognition of the right of business men to engage in honest and innocent business competition; competition not characterized by malice, fraud, deception or other unfair dealings. The natural and honest rivalry between one business man and another, each striving for business and profits, constitutes the competition which has been called "the life of trade".

The fact that such clean and honorable competition may *incidentally* work substantial injury upon others is not material. The doctrine of *sic utere tuo,* etc., is clearly inapplicable to the present system of private competition under a capitalist economy, which necessarily predicates the existence of noncompensatory injury among competitors. Since the early Schoolmasters Case of 1410, in which two schoolmasters unsuccessfully brought suit against a newcomer whose competition had brought a drastic reduction of fees, it has been held that injury re-

sulting from the normal and usual effects of competition, while no different in kind or extent from that resulting from methods clearly unfair, is *damnum absque injuria.*

Schoolmasters Case, Anonymous, Y. B. 11 Hen. IV, f. 47, p. 21 (1410);

63 *Corpus Juris,* p. 413, par. 110, and cases there cited;

Handler: Unfair Competition, Vol. 21, Iowa Law Review, No. 2 (Jan. 1936), p. 181;

Wyman:Competition and the Law, 15 Harv. Law Review, p. 427 (Feb. 1902).

As stated in *Boggs v. Duncan-Schell Furniture Co.,* 163 Iowa, 106, 143 N. W. 483 (163 Iowa, at p. 115):

> "Every man has the legal right to advance himself before his fellows, and to build up his own business enterprises, and to use all lawful means to that end, although in the path of his impetuous movements he leaves strewn the victims of his greater industry, energy, skill, prowess, or foresight."

While the legislature is not bound by the comparatively narrow common law traditions, in defining and prohibiting acts of unfair competition, but is free to follow its creative impulses, such legislation being grounded in the police power, must bear a real and substantial relation to the public welfare. Appellant respectfully submits that where a business man's conduct—in this case, his pricing policy—is not characterized by anything fraudulent, deceptive or dishonest, and where it conforms in all respects to the approved standards of business conduct, as generally understood and practiced by legitimate merchants, the public welfare is not directly at stake, and the

legislature has no more power than did the courts at common law, to interfere with his business policies. Thus while the common law concept of unfair competition has been, and is constantly being, expanded by statute to cover new situations, as they arise, there has always gone along with such development, a recognition of the fact that legislatures, as well as courts, are without power to extend the concept of unfair competition to acts which restrict ordinary competition, as it is generally understood in trade and commerce. It is well established that the police power does not extend to protecting classes or groups of business men against the risks of ordinary business competition.

New State Ice Co. v. Liebmann, 285 U. S. 262, 76 L. ed. 747, 52 S. Ct. 371;

State v. Old Tavern Farm, 133 Me. 468, 180 Atl. 473;

State v. Latham, 115 Me. 176, 98 Atl. 578.

For example, while the term "unfair methods of competition" as used in the Federal Trade Commission Act has been held to be broader than "unfair competition" at common law (*Schechter Poultry Corporation v. United States,* 295 U. S. 495, 79 L. ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947), this court has said of these words that—

> "They are clearly inapplicable to practices never heretofore regarded as opposed to good morals, because characterized by deception, bath faith, fraud or oppression, or as against public policy because of their

dangerous tendency unduly to hinder competition or create monopoly. *The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade.*" (Italics added.)

Federal Trade Commission v. Gratz, 253 U. S. 421, at pp. 427,428, 64 L. ed. 993, 40 S. Ct. 572.

To the same effect:

Federal Trade Commission v. Curtis Pub. Co., 260 U. S. 568, 67 L. ed. 408, 43 S. Ct. 210;

National Biscuit Co. v. Federal Trade Commission, 299 Fed. 733 (Cert. Den. 266 U. S. 613, 45 S. Ct. 95, 69 L. ed. 468).

In *Federal Trade Commission v. Sinclair Refin. Co.,* 261 U. S. 463, 67 L. ed. 746, 43 S. Ct. 450, this court said of the powers of the Commission (261 U. S. at pp. 475, 476):

"It has no general authority to compel competitors to a common level, to interfere with ordinary business method or prescribe arbitrary standards for those engaged in the conflict for advantage called competition. The great purpose of both statutes was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain. And to this end it is essential that those who adventure their time, skill and capital should have large freedom of action in the conduct of their own affairs."

The mere sale of goods below cost, in the absence of unfair dealing has been held not to constitute an unfair method of competition under the Federal Trade Commission Act.

Sears, Roebuck v. Federal Trade Commission, 258 Fed. 307 (C. C. A.).

And under Section 2 of the Clayton Act which prohibits price discrimination, it has been held that the act extends only to price discrimination which lessens competition or tends to create a monopoly. In the absence of such circumstances the act does not apply, even where the defendant cuts prices as a form of advertising.

Kresge Co. v. Champion Spark Plug Co., 3 Fed. (2d) 415.

It has already been observed that state laws which fail to distinguish between innocent and malicious price cutting are invalid.

Fairmont Creamery Co. v. Minnesota, supra.

Numerous trade conference rules adopted at the trade conferences sponsored by the Federal Trade Commission recognize the same distinction.

C. C. H. Federal Trade Regulation Service, Vol. II, 7th ed., index p. 4027; pp. 4051-4456.

Thus in judicial decisions, legislative action and administrative rules, there has consistently been recognized the absence of any governmental authority, even under the police power, to upset the plane of normal business competition by attempting to convert ordinary and customary business practices into acts of unfair competition.

In the present case the lack of such power is supported by the strongest of considerations. The injury suffered by a manufacturer or retailer from price competition is not for them an inescapable one. On the contrary, it is self-invited, resulting directly from the particular method of distribution selected by the manufacturer for the distribution of his goods. It is unequivocally established that a manufacturer may achieve the result of maintaining a uniform consumer price by retaining title to his goods throughout the process of distribution.

> *United States v. General Electric Co.*, 272 U. S. 476, 71 L. ed. 362, 47 S. Ct. 192;
>
> *Federal Trade Commission v. Curtis Pub. Co.*, 260 U. S. 568, 67 L. ed. 408, 43 S. Ct. 210.

It has been pertinently remarked in this connection that:

> "If there exists a real economic basis for the enormous advertising expenditures by which manufacturers endeavor to weave bonds of consumer goodwill which stretch over the heads of distributors, can it be doubted that the protection of those tenuous threads by the creation of true forms of agency or the extension of industrial integration marketwards will be justified."
>
> National Industrial Conference Board: Public Regulation of Trade Practices (1929) at p. 99.

And see:

> Stevens: Resale Price Maintenance as Unfair Competition, 19 Col. Law Review, p. 265, at p. 273 (June, 1919).

In so far as it applies to honest and legitimate price competition, the present legislation has as its sole object, the protection of manufacturers who have failed to adopt such a system, but prefer to distribute and sell their product through independent wholesale and retail outlets.

In its essence, therefore, the Fair Trade Act is an attempt to maintain a system of distribution by which, through extensive advertising, manufacturers seek to make the entire distributive system merely an agent for the manufacturer, and at the same time avoid the legal responsibility attendant upon such relationship. In brief, it is designed to this extent, *solely to protect a particular system of distributing consumer's goods.* Certainly the public welfare does not require that such a system of distribution, which has been deliberately selected by manufacturers to secure the practical benefits of a legal relationship whose burdens they are unwilling to assume, should be maintained over some other system, *at the expense of property rights.*

To spin a benefit to the public welfare out of such gossamer threads may be philosophically possible—practically it is defeated by the implications of its own tenuousness. For if a manufacturer may select a particular system of distributing his goods and then, on the grounds of public welfare, appeal to the legislature for protection of his capital investment in good will, against the hazards of ordinary and honest price competition, by the same token he may appeal to the legislature to protect his capital investment in machinery against the competitive risk arising from the marketing by a competitor of a new substitute for his product. It is unnecessary to delineate the consequences which would follow from the adoption of such

a view. It may be dogmatically asserted that such interpretation of the general welfare essential to the permissible exercise of the state police power, would invite a revolution in our concept of the function of government in our present economy.

It should be evident, therefore, that injury *per se* is not the *sine qua non* for legislative interference with trade practices; where the prohibited acts do not depart from the generally accepted standards of what constitutes fair play. Accordingly, the mere fact that appellees claim that they will be injured as a consequence of appellant's pricing policy [Tr. of Record, p. 12] does not justify the statute in unconditionally prohibiting all price competition.

Since Section 1½ of the Fair Trade Act, on its face, does not confine itself to price competition which can be classified as unfair, according to any accepted norms of business ethics, but extends as well to competition which is essentially legitimate, and since the latter type of competition, even though it may at times work an injury, does not affect the general welfare so as to warrant its prohibition at the expense of destroying personal and property rights, the act is necessarily lacking in any substantial relation between its assumed purpose and its actual provisions.

It will not be seriously contended that the allegations of the complaint, that appellant maliciously cut prices without justification, or that he conspired to injure the appellees, makes this argument unavailable in the present case. Appellees' rights must be measured by the statute, the deficiencies of which cannot be supplied by a pleading. These allegations are not ingredients of the statutory offense created by the statute and are totally immaterial,

in making out a case under it. They are not, therefore, admitted by appellant's demurrer.

County of Tulare v. County of Kern, 132 Cal. App. 462, 22 Pac. 750;

French v. Senate of California, 146 Cal. 604, 80 Pac. 1031;

United States v. Van Auken, 96 U. S. 366, 24 L. ed. 852;

Pierce Oil Corporation v. Hope, 248 U. S. 498, 63 L. ed. 381, 39 S. Ct. 172.

Moreover, being mere conclusions of law, they must be ignored.

Pierce Oil Corporation v. Hope, supra;

Pennie v. Reis, 132 U. S. 464, 33 L. ed. 426, 10 S. Ct. 149;

Norta v. United States, 294 U. S. 317, 79 L. ed. 907, 55 S. Ct. 428, 95 A. L. R. 1326.

Consequently, the pertinent application herein of the principles above discussed, cannot be questioned.

2. *The Statute May Be Invoked in Favor of Those Not Entitled to Its Protection.*

Not content with sweeping up the innocent along with the guilty in its dragnet, the statute is equally obnoxious to the concept of a reasonable police regulation in that it may be invoked by a large class of persons not entitled to its protection. Admittedly, it is designed to protect the good will of a manufacturer or producer, built up through extensive advertising and other devices, as a result of which he may reasonably expect continued public patron-

age. On the grounds of an alleged need for protecting the good will attached to established, widely advertised and well known trade-marks, trade-names and brands, the inroads which the statute makes upon personal and property rights have been defended. But unhappily its scope is not limited to this class of goods. While its title states that it is directed against injurious practices in the distribution of articles "of standard quality under a distinguished trade-mark, brand or name" (Calif. Stats. 1931, page 583, as amended by Stats. 1933, page 793), the body of the act is not so limited; on the contrary, it affords protection in the case of all contracts relating to the sale of a commodity "which bears or the label or content of which bears, the trade-mark, brand, or name of the producer or owner * * *."

It is immediately apparent that in its scope the body of the act goes far beyond anything contained in its title. Nowhere is the act itself limited to articles "of standard quality" or to articles sold under a "distinguished trade-mark, brand or name". On the contrary, any manufacturer, producer or distributor, whether the article he deals in is of "standard quality" or not, whether it bears a "distinguished trade-mark, brand or name" or not, may invoke the aid of the statute. All that is necessary is that he affix his *name* to the product. It matters not that his name is totally unknown. It may not be known to ten people. It may be without value as a trade-name, and the manufacturer may have acquired no good will under it deserving of protection. The statute still gives him a cause of action. Anyone whose name, however insignificantly or inconspicuously placed, appears on a package or container or on the contents, and though the product

itself is simply anonymously labeled "flour", "wheat", "soap", etc., is an object of the statute's beneficence. (Compare in this connection, *Borden's Farm Products Company, Inc. v. Ten Eyck*, ... U. S. ....., 80 L. ed. 469, 56 S. Ct. 453, referring to the New York Milk Control Act, where protection was afforded to independent milk dealers against those having a "well advertised trade-name", and which required a finding on the point by the administrative authority, after a hearing duly had.)

Under these circumstances, the act is bound to permit price fixing with reference to almost every type of consumer's goods. Very few articles are wholly anonymous in origin. Somewhere on the package, container or the contents of almost every article of retail trade, can usually be found at least the name of the manufacturer or producer, which is sufficient to bring it within the operation of the act. And those products which are without such name can easily be brought within the act, by the simple device of adding one.

The act thus extends across the entire field of retail trade, protecting those not entitled to protection and penalizing those not guilty of wrong. It would be difficult to find a more flagrant violation of the rule which requires that a reasonable relation exist between police regulations and the object to which they relate, and which precludes as arbitrary and unreasonable "shot gun legislation"—legislation whose pellets fly helter and skelter in every direction in the hope that thereby it will bring down its lawful prey. Appellant submits that to uphold the Fair Trade Act under these circumstances, would not only deprive appellant of valuable personal and property rights but would also set a dangerous precedent by which all

honest merchants will ultimately be legislated out of existence.

Appellant is aware that the complaint herein alleges that the particular articles here involved are trademarked [Tr. of Record, pages 2-3] and that it has been said that a litigant may object to the constitutionality of a statute only insofar as it is sought to be used against him. Yet, this court has also held, that where constitutional rights of an individual are involved, as in the present case, the proper test to be applied in passing upon a statute's validity is to determine, not what has been done under the act, not what the parties have done in the case before the court, but rather what can by its authority be done under and by virtue of its provisions.

Montana Company v. St. Louis Mining and Milling Co., 152 U. S. 160, 169, 170, 38 L. ed. 398, 14 S. Ct. 506;

Employers' Liability Cases, 207 U. S. 463, 52 L. ed. 297, 28 S. Ct. 141.

And this is the generally recognized view, both in state and federal decisions.

Minneapolis Brewing Co. v. M'Gillivray, 104 Fed. 258, 269;

Samson v. Perry, 17 Fed. (2d) 1, 2;

Central National Bank v. McFarland, 20 Fed. (2d) 416, 418;

City of Los Angeles v. Lewis, 175 Cal. 777, 167 Pac. 390;

Hewitt v. Board of Medical Examiners, 148 Cal. 590, 84 Pac. 39;

State v. O'Leary, 43 Mont. 157, 115 Pac. 204.

Assuming that this particular vice in the statute is not present in the instant case, nevertheless a prior attack by another litigant affected by this vicious feature of the statute would unquestionably render it entirely void; appellant's substantive rights should not be prejudiced by the fortuitous sequence of suits. (Note: 47 *Harvard Law Review*, 677, at p. 680.)

This fault in the statute is not remedied by the fact that the price competition which constitutes unfair competition under the act is actionable only "at the suit of any person damaged thereby". As previously pointed out herein, injury may result from forms of fair competition which cannot be made actionable by statute, and this clause in the act is, therefore, no assurance of protection from the arbitrary operation of the statute.

(B) THE STATUTE IS ARBITRARY AND DISCRIMINATORY IN THAT IT DELEGATES TO A PRIVATE INDIVIDUAL ARBITRARY POWER TO DETERMINE THE EXTENT TO WHICH APPELLANT MAY DEAL IN HIS PROPERTY.

It is trite law that legislative authority over private property or personal rights cannot be delegated to, or vested in, administrative officers without setting up some definite standards to guide their action.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220. 6 Sup. Ct. Rep. 1064;

Schechter Poultry Corporation v. United States, *supra.*

With much greater force does this rule apply where an attempt is made to delegate such arbitrary power to private individuals.

Eubank v. Richmond, 226 U. S. 137, 57 L. ed. 156, 33 Sup. Ct. Rep. 76;

Washington v. Roberge, 278 U. S. 116, 73 L. ed. 210, 49 Sup. Ct. Rep. 50;

Carter v. Carter Coal Company and Others, ... U. S. ....., 80 L. ed. 749, 56 Sup. Ct. Rep. 855.

In the first case above quoted the court held unconstitutional a city ordinance which permitted the owners of two-thirds of the property abutting on any street to require that the city street committee establish a building line binding upon all of the property owners on the street. The court said (226 U. S. at pp. 143, 144):

> "The action of the committee is determined by two-thirds of the property owners. In other words, part of the property owners fronting on the block determine the extent of use that other owners shall make of their lots, and against the restriction they are impotent. This we emphasize. One set of owners determine not only the extent of use but the kind of use which another set of owners may make of their property. In what way is the public safety, convenience or welfare served by conferring such power? The statute and ordinance, while conferring the power on some property holders to virtually control and dispose of the property rights of others, creates no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest or even capriciously."

In the *Roberge* case, a city zoning ordinance prohibited the erection of a philanthropic home, without the written consent of the owners of two-thirds of the property within 400 feet of the proposed building. The court overthrew the ordinance, stating (278 U. S. at pp. 121, 122):

> "The section purports to give the owners of less than one-half the land within 400 feet of the proposed building authority—uncontrolled by any standard or rule prescribed by legislative action—to prevent the trustee from using its land for the proposed home. The superintendent is bound by the decision or inaction of such owners. There is no provision for review under the ordinance; their failure to give consent is final. They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily and may subject the trustee to their will or caprice. Yick Wo v. Hopkins, 118 U. S. 356, 366, 368. *The delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment.* Eubank v. Richmond, 226 U. S. 137, 143; Browning v. Hooper, 269 U. S. 396." (Italics added.)

In the *Carter* case the court had before it, *inter alia*, the validity of certain provisions of the Bituminous Coal Conservation Act of 1935, which delegated the power to fix maximum hours of labor and minimum wages to a part of the producers and miners of coal, whose decisions on such matters were to be binding upon all. This court concluded that such delegation was a denial of due process of law, stating (80 L. ed. at pp. 769, 770):

> "The effect, in respect of wages and hours, is to subject the dissentient minority, either of producers or miners or both, to the will of the stated majority,

since, by refusing to submit, the minority at once incurs the hazard of enforcement of the drastic compulsory provisions of the act to which we have referred. To 'accept', in these circumstances, is not to exercise a choice, but to surrender to force.

"The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. * * *

"* * * one person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question. Al. A. Schechter Poultry Corp. v. United States, 295 U. S. at p. 537, 79 L. ed. 1584, 55 S. Ct. 837, 97 A. L. R. 947; Eubank v. Richmond, 226 U. S. 137, 143, 57 L. ed. 156, 159, 33 S. Ct. 76, 42 L. R. A. (N. S.) 1123, Ann. Cas. 1914B, 192; Washington *ex rel* Seattle Title Trust Co. v. Roberge, 278 U. S. 116, 121, 122, 73 L. ed. 210, 213, 214, 49 S. Ct. 50, 86 A. L. R. 654."

The application of the above enunciated principles to the present case is clear.. Assuming that so-called "predatory" or other obnoxious forms of price cutting may be

prevented by legislative means which do not overstep the boundaries of the evils sought to be reached, such legislative means are not employed where, as here, they are vested in the uncontrolled discretion of private individuals who have the unrestricted power to fix the price at which another person may sell his property and the arbitrary right to determine what constitutes fair price competition on the part of such person. The opportunities for arbitrary and discriminatory applications of the statute resulting from this situation are boundless; the invitation to utilize them, irresistible.

In the first place the statute, even though it covers an almost unlimited field of commodities including necessities of life, contains no provision for administrative or judicial review to make certain that the prices fixed will be reasonable. Thus there is conferred on the manufacturer the power to fix unreasonable and arbitrary prices.

> "The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices."
>
> *United States v. Trenton Potteries,* 273 U. S. 392 at p. 397, 71 L. ed. 700, 47 S. Ct. 377.

The danger thus presented is not imaginary but real. During 1925 the Canadian druggists organized the Proprietary Articles Trade Association which was designed to accomplish resale price maintenance through the establishment of standard margins of profit. The association was broken up in October 1927 under the terms of the Combines Investigation Act. The recorded results were that consumer prices unduly rose (*Haring: Retail Price Cutting* (1935), p. 195). A similar result has been

prophesied for statutory resale price maintenance in this country (*Federal Trade Commission Report on Resale Price Maintenance,* Part II, pp. 163-5). Without necessarily joining in this prediction, it is enough to assert that the present statute confers on private individuals at least the *power* to fix unreasonable and arbitrary prices.

Moreover, the act does not require that the manufacturer sell his product at the same uniform price, even to the same class of retail or wholesale purchasers. And the contracts fixing resale prices are not required to be uniform or consistent. Thus, the manufacturer may sell his product at varying discounts, or even at less than cost, to some wholesalers or retailers and at "standard" prices to others. Discriminatory advertising allowances, free deals, rebates and other similar devices may be used to grant special concessions to some and not to others. Such devices are already in widespread use.

Haring: Retail Price Cutting, Chapters 4 and 5;
Seligman & Love: Price Cutting and Price Maintenance, pages 132-136.

Coupled with the failure of the statute to recognize such favoritism in the terms of purchase from the manufacturer, is the inevitability of arbitrary operation of the act in its application to retail sales. It prohibits the making of sales below the price fixed by the manufacturer in "any contract" entered into with a third party. Suppose the manufacturer enters into two contracts prescribing two different resale prices for retailers. Which of such prices is to govern,—the higher or the lower? The act does not say, and a retailer who has knowledge of both prices is required to choose between them at his

peril. Moreover, since the manufacturer is not required to maintain a uniform system of contracts or of resale prices, manufacturer X may fix a resale price in a contract with B and a higher one in a contract with C; thereupon retailer C, by notifying B of the resale price fixed in C's contract, may prohibit B from selling below that price. Thus B is prevented from reselling the commodities which he purchased from X *at the very price specified in his contract with X*. Moreover, X may sell to A without imposing any price restriction whatsoever, and to B he may sell subject to resale price restrictions. B is then permitted to sue A for damages for knowingly reselling below the price fixed in B's contract, although X has not prohibited A from the making of such sales.

Again, all that the statute requires is that a retailer have *notice* of the price fixed by the manufacturer. It does not require that a copy of the contract be delivered to any merchants against whom the manufacturer may desire to enforce resale price restrictions. Thus a merchant, informed of the resale price fixed in a contract, in order to determine whether he is bound by the price therein fixed, must decide at his peril whether such contract is legal and binding upon the parties thereto. Moreover, the act does not require that a retailer, once notified of a price restriction, be informed of any change in the terms thereof. In the contracts sued on in the instant case, such change may be effected by appellees at any time upon ten days' written notice to the other party to the contract. [Tr. of Rec. p. 19, Section 4 of the Agreement.] Assuming such provisions to be valid (compare Columbia Law Review, Vol. 36, No. 2 (February, 1936), p. 293), it is clear that if appellant is forced to abide by

the prices fixed by appellees upon receiving notice thereof, he is at least entitled to receive notice of any changes made therein; otherwise he is in a position of being required, at his peril, to continue to sell for the fixed price, even though appellees, without notice to appellant, may have favored appellant's competitors with a reduction of such price ten days after giving appellant such notice.

It would be harmful enough if this arbitrary and discriminatory power over appellant's property which the act thus sanctions were vested in an administrative officer or agency; it would be more harmful if it were vested in some disinterested private person. It is doubly harmful where, as here, it is vested in those who are his direct business competitors. One person may not be permitted to regulate the business of another, and especially of a competitor. As this court stated in *Carter v. Carter Coal Company, supra* (..... U. S. ....., at p. .....; 80 L. ed. at p. 169):

> "This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, *but to private persons whose interests may be and often are adverse to the interests of others in the same business.*" (Italics added.)

There is no necessity for further enumeration of mischievous consequences which would follow if such delegation were permitted to go unchallenged in the present case. It is enough to recognize that by the rule laid down in the foregoing decisions the law unequivocally thwarts it.

There is no solace for appellees in the contention that these arbitrary and discriminatory features are not all raised in the instant case. It has already been pointed out herein that what may be done under an act of this

kind is a proper test in determining its validity. (*Montana Company v. St. Louis Mining etc. Co., supra.*) Moreover, these oppressive features constitute a standing invitation to a competitor to inflict injury upon appellant, and thus inhere in the very nature of the statute. These the court may properly consider, in determining the nature and extent of the unrestrained delegation of power which the act permits. In *Carter v. Carter Coal Company, supra.* this court, in holding unconstitutional the labor provisions of the Bituminous Coal Conservation Act of 1935, pointed out the arbitrary and discriminatory manner in which such provisions might operate in different localities and under various conditions, despite the fact that none of these circumstances were present in the case before the court. In *Eubank v. Richmond,* after pointing out some of the harmful and arbitrary consequences which the act permitted, but which were not present in the case, this court said (226 U. S. at p. 144):

> "We are testing the ordinance by its extreme possibilities to show how in its tendency and instances it enables the convenience or purpose of one set of property owners to control the property right of others, and property determined, as the case may be, for business or residence—even, it may be, the kind of business or character of residence. * * * If it be said that in the instant case there is no such condition presented, we answer that there is control of the property of plaintiff in error by other owners of property exercised under the ordinance. This, as we have said, is the vice of the ordinance, and makes it, we think, an unreasonable exercise of the police power."

Similarly here, although not all of the arbitrary features above pointed out have come out in the present case, they

do show how the act, in its tendency and instances, enables the convenience or purpose of appellant's business competitors to control appellant's property rights. And if it be said that these conditions are not here present, it may likewise be answered that there is control of the property of appellant by others, and this is the vice in the enactment.

The suggestion of the California Supreme Court that these iniquitous situations may be avoided by the courts in enforcing the act, since the chief relief under the act would be equitable (91 Cal. Dec. at p. 359), is, we respectfully submit, untenable. An action for damages is equally available to anyone injured and, in any event, the equitable discretion of the court is not a valid substitution for constitutional protection.

> *Roller v. Holly,* 176 U. S. 398, 409, 44 L. Ed. 520, 20 Sup. Ct. 410;
>
> *Louisville & Nashville RR. v. Central Stock Yards Co.,* 212 U. S. 132, 144, 53 L. Ed. 441, 29 Sup. Ct. Rep. 246.

As was said in *Roller v. Holly,* 176 U. S. at p. 409:

> "The rights of a citizen to due process of law must rest upon a basis more substantial than favor or discretion."

It follows that section 1½ of the Fair Trade Act is arbitrary and discriminatory in vesting uncontrolled power over appellant's property in private persons. This defect, coupled with the utter failure of the statute to indicate a real and substantial relation to a proper legislative purpose, already pointed out herein, completely dispels any suggestion that it is a permissible exercise of the police power.

III.

The Statute Is Ambiguous, Indefinite, and Unintelligible and for These Reasons Void.

While section 1½ of the California Fair Trade Act is an all-embracing price-fixing statute, it purports to require, as a condition precedent to the enforcement of liability under it, proof that the commodity involved is in "fair and open competition with commodities of the same general class produced by others". This it does by confining its operation to the commodities referred to in section 1 of the act. If in a given case any of these conditions do not exist, the retailer is not bound, even though he has notice of the restrictions. Thus these conditions become the sole standards which mark and define the limits of permissible price competition under the statute. They constitute an integral part of the very definition of the statutory tort which the act creates.

Equally significant is the fact that the duty of determining the continuing existence of these standards is imposed squarely on the shoulders of the retailer. It follows that the ability of the retailer to comprehend their intent, meaning and scope is of prime importance, as is likewise the facility with which he is enabled to determine their continuing existence as to the commodities which he carries for sale. To the extent that he possesses this knowledge, he may ignore safely the inhibitions of the statute in cases in which one or more of these requisite conditions are absent; to the extent that he is unable to grasp it, he acts at his peril, for if in his attempt to ascertain these facts he guesses wrongly, he becomes guilty of unfair competition under the statute. The act contains no provision exculpating one who violates its pro-

visions through ignorance, or through inability to understand their meaning and scope.

If, therefore, the standards laid down by the statute are so vague, uncertain and ambiguous that they can neither be understood nor applied by any reasonable person, the prudent retailer, from motives of self-protection against costly litigation and possible judgments, will be forced to assume that they are present in every case. Thus the conditions necessary to bring a commodity within the statute are not conditions, the standards laid down are not standards, and the statute is distorted by legislative incoherence into an entirely different form and substance. When, as in the present case, such statute purports to deal with personal or property rights, such vagueness, uncertainty and ambiguity in its terms and in the definition of the offense which it seeks to create, renders it violative of due process and, therefore, unconstitutional. It has long been settled by repeated decisions of this court that a statute which either forbids or prohibits the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application, violates the first essential of due process of law.

United States v. L. Cohen Grocery Co., 255 U. S. 81, 65 L. Ed. 516, 41 Sup. Ct. 298, 14 A. L. R. 1045;

Connally v. General Construction Co., 269 U. S. 385, 70 L. Ed. 322, 46 Sup. Ct. 126;

International Harvester Co. v. Kentucky, 234 U. S. 216, 58 L. Ed. 1284, 34 Sup. Ct. 853;

Weeds, Inc., v. United States, 255 U. S. 109, 65 L. Ed. 537, 41 Sup. Ct. 306;

Cline v. Frink Dairy Co., 274 U. S. 445, 71 L. Ed. 146, 47 Sup. Ct. 681;

A. B. Small Co. v. American Sugar Refining Co., 267 U. S. 233, 69 L. Ed. 589, 45 Sup. Ct. 295;

Champlin Refining Co. v. Corporation Commission, 286 U. S. 210, 76 L. Ed. 1062, 52 Sup. Ct. 559, 86 A. L. R. 403.

The rule is similar in the state courts.

Standard Chemicals Corp. v. Waugh Chemical Corp., 231 N. Y. 51, 131 N. E. 566, 14 A. L. R. 1054;

People v. Mancuso, 255 N. Y. 463, 175 N. E. 177, 76 A. L. R. 514;

Vallat v. Radium Dial Co., 360 Ill. 407, 196 N. E. 485, 99 A. L. R. 607;

People v. Pace, 73 Cal. App. 548, 238 Pac. 1089;

In re Schmolke, 199 Cal. 42, 248 Pac. 244.

This principle applies as well to civil cases as to criminal cases.

A. B. Small Co. v. American Sugar Refining Co., supra;

Standard Chemicals Corp. v. Waugh Chemical Corp., supra;

Vallat v. Radium Dial Co., supra.

The accepted test for determining the sufficiency of statutory standards is whether the words which comprise the standards have either acquired a recognized meaning

at common law or have some technical or special meaning known to those required to use them.

United States v. L. Cohen Grocery Co., supra;

Weeds, Inc., v. United States, supra;

A. B. Small Co. v. American Sugar Refining Co., supra;

Connally v .General Construction Co., supra;

Champlin Refining Co. v. Corporation Commission, supra;

Vallat v. Radium Dial Co., supra;

People v. Mancuso, supra.

Thus, in *Connally v. General Construction Co., supra,* this court said: (269 U. S. at p. 391)

> "* * * the decisions of the court, upholding statutes as sufficiently certain, rested upon the conclusion that they employed rules or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them * * * or a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ."

In *Champlin Refining Co. v. Corporation Commission, supra,* the court had before it the sufficiency as a statutory standard of the expression "waste" as applied to the production of oil. In rejecting this expression, the court said: (286 U. S. at pp. 242, 243)

> "The general expressions employed here are not known to the common law or shown to have any meaning in the oil industry sufficiently definite to enable those familiar with the operation of oil wells to employ them with any reasonable degree of certainty."

In *Vallat v. Radium Dial Co., supra,* the Illinois Supreme Court stated the rule as follows: (360 Ill. at pp. 412, 413).

> "In order that the statute may be held valid, the duty imposed by it must be prescribed in terms definite enough to serve as a guide to those who have the duty imposed upon them * * * but if the duty is imposed by statute through the use of words which have not yet acquired definiteness or certainty and which are so general and indefinite that they furnish no such guide the statute must be declared to be invalid."

And in *People v. Mancuso, supra,* statutory standards were held inadequate: (255 N. Y. at p. 471)

> "* * * where neither accepted norms of conduct nor common-law traditions of customary diligence give definiteness and significance to the acts to be avoided (citing cases) not even a civil liability can rest upon a prohibition so vague and indeterminate."

It is also necessary that the subject matter of the standard must be available to the party required to apply it, *i. e.,* it must inhere in the transaction governed by the statute and not refer to something speculative or ulterior to the case.

> *United States v. L. Cohen Grocery Co., supra,* 255 U. S. at pp. 89-91;
>
> *Cline v. Frink Dairy Co., supra,* 274 U. S. at pp. 459, 460;
>
> *Champlin Refining Co. v. Corporation Commission, supra,* 286 U. S. at p. 243.

Appellant respectfully contends that the provisions of the Fair Trade Act hereinbefore referred to, flagrantly

violate the foregoing rules, and that for this reason the statute must be declared invalid. The expressions used in the statute "fair and open competition" and "commodities of the same general class produced by others" will be separately considered.

While at common law the term "unfair competition" was originally restricted to cases of "passing off", it has gradually become expanded so as to cover other classes of competitive torts.

Schechter Poultry Corp. v. United States, supra, at pp. 531, 532;

Handler: Unfair Competition, Vol. 21, Iowa Law Review, pp. 179-213 (Jan., 1936);

Nims on Unfair Competition, Chap. 19, pp. 770-812.

For our present purposes, however, it is not necessary to determine its precise meaning, for it is perfectly apparent that the expression "fair and open competition", as used in the present statute, is not its antithesis.

In the first place, the expression "unfair competition", whether considered in its restricted early common-law sense or in its present expanded use, refers to acts and conduct on the part of specific and identified persons, whereas the Fair Trade Act refers to *commodities* which are in "fair and open competition with *commodities* of the same general class", etc. Hence the expression "fair and open competition", as used in the act, refers, not to any fairness or unfairness in the *conduct of the manufacturer* in distributing and selling his goods but to some quality of the *commodity itself* which it may acquire, apparently, at any stage in its transit from the manufacturer to the

ultimate consumer. This introduces a new and novel kind of unfair competition into the law, the existence of which is judged, not by any unfair, harmful, or malicious acts on the part of the producer, but by some peculiar and indefinite attributes of the commodity which may be imparted to it by the manufacturer or by any one of a thousand or more wholesalers, jobbers or retailers through whose hands it passes.

Numerous acts which might be unfair competition on the part of the manufacturer are not necessarily related to the particular commoditiy which he produces. Illustrative of these are disparagement of a rival's goods, inducing breach of contract, obstruction of competitor's customers, commercial bribery, etc. Thus a manufacturer may personally engage in acts of unfair competition, but as long as the *commodity itself* is not in unfair competition, by the express language of the statute, he may require third parties to comply with his dictates as to its resale price. On the other hand, even though the manufacturer does not engage in acts of unfair competition, it does not follow that the commodity itself, which is the real criterion under the act, is not in unfair competition, for under the particular system of distribution to which the act relates, and which, presumably, it is the purpose of the act to protect, the commodity may be sold by numerous wholesalers, jobbers and retailers throughout the state. This is true in the present case. [Page 13 of Complaint, Tr. of Record pp. 8-9.] Obviously, the unfair tactics of any one or more of these classes or of any one or more individuals within any one of these classes, who participate in the distribution of the commodity, may constitute it, *pro tanto,* in unfair competition with other commodities.

Clearly then, the act refers to acts and conduct other than those embraced within the common law concept of unfair competition; to some new, unknown and undefined competitive condition which is referable to the commodity itself as it flows into the public's hands through the medium of thousands of jobbers, wholesalers and retailers throughout the state.

Moreover, it is not enough that the commodity be in fair competition with other commodities; it must also be in "open" competition. Appellant has been unable to find any commonly known or generally accepted common law meaning given to the word "open" or the expression "fair and open" in relation to the term "competition", and submits that there is none. That the legislature intended the word "open" to convey some meaning not included within the word "fair" cannot be questioned. It must be presumed that the legislature intends a meaning to be given to every word used in its enactments.

Wiborg v. United States, 163 U. S. 632, 41 L. Ed. 289, 16 S. Ct. 1127;

Platt v. Union Pacific Ry. Co., 99 U. S. 48, 25 L. Ed. 424.

It is important to note, also, that the standard "fair and open competition" is referable, not to facts which relate to the conduct of appellant in the case at bar, not to anything intrinsic in the present case, but to an extrinsic competitive condition which would impose on appellant the superhuman task of investigating the competitive status of appellees' commodity, not only with respect to appellees' own conduct in relation thereto, but also as it passes through the hands of numerous wholesalers and jobbers and thousands of retailers throughout the state. Such bur-

den cannot rightfully be imposed on appellant. This court has steadfastly rejected such ulterior standards which are disconnected entirely from the case at issue, or the party against whom the standard is invoked.

United States v. L. Cohen Grocery Co., supra;
Champlin Refining Co. v. Corporation Commission, supra, at p. 243.

It follows that the words "fair and open competition" are without foundation in any common law source, are devoid of any generally recognized meaning, and relate not to the conduct of the parties bound by the act, but to facts entirely foreign to the case. They must, therefore, be rejected as too ambiguous and uncertain to serve as statutory standards in the act.

We turn now to the expression "general class" in conjunction with which this term "fair and open competition" is used. It would appear hardly necessary to go beyond the common definition of the word "general" to demonstrate that it does not offer an intelligible standard to aid the merchant in determining the circumstances under which he is bound by the statute. According to Webster's New Unabridged Dictionary the word "general" means, among other things: "Not specific, not precise or definite." Thus, indefiniteness is part of the very definition of the term.

There is nothing to indicate what criterion is to be used in applying the term. If it be supposed that the use or purpose to which an article is put is controlling, confusion and uncertainty is bound to result. For example, suppose retailer A desires to sell a trade marked brand of olive oil at a price less than the manufacturer's fixed price.

He knows he may lawfully do so if it is not in fair and open competition with commodities of the same "general class" produced by others. He further knows, however, that olive oil is put to a myriad of uses, being used, in fact, for everything from salad dressing to skin beautifier and from a sunburn remedy to a health tonic. Manifestly, it is impossible for him to determine the general class to which it belongs. He knows not whether to classify it as a food, toilet article, or medicine.

If we substitute as a test the inherent qualities of the commodity, in lieu of its use or purpose, we are no closer to certainty of meaning. To what "general class" does a book such as "Anthony Adverse" belong? Does it include only works of fiction or does it include nonfiction as well? Does it extend to magazines and periodicals? Does it take in text-books and encyclopedias?

If price is to be controlling, the point is still uncertain. Is the general class to which Ingersoll watches belong limited to the class of cheap watches; does it include more expensive watches, like Bulova and Hamilton; does it include diamond watches; does it extend to all timepieces; does it embrace all jewelry?

Obviously, in each of the above cases, any one of the classifications could be justified, as well as any other, as being the "general class" to which the commodity belongs.

And what of the particular items involved in this action—lipstick, face powder and rouge? Does the "general class" to which Max Factor face powder belongs include only face powders? Does it include the class of face powders sold in Woolworth's, as well as the imported powders sold in the exclusive specialty shops? Does it include

cold creams? Does it extend to all cosmetics? Does it embrace all toilet articles?

The foregoing illustrations could be multiplied indefinitely. Enough has been said, however, to demonstrate the utter impossibility of placing on the words "commodities of the same general class" any tangible meaning which would enable the average merchant intelligently to determine whether he is or is not bound by the resale price restrictions which the manufacturer seeks to impose upon him.

The uncertainty of the expression "any contract" has already been adverted to in an earlier portion of this brief, and what was said there with respect to the arbitrary operation of the statute applies, as well, to the point now under discussion.

The combination of the expressions "fair and open competition", "commodities of the same general class produced by others", and "any contract", is fatal for the validity of the act. It would require legerdemain, not logic, to ascertain their combined meaning. It would be strange, indeed, if any judicial precedent could be found to sustain such nebulous expressions. Inevitably, all of the decisions point to an opposite conclusion.

Thus, in *United States v. L. Cohen Grocery Co., supra,* it was held that the standard of an "unjust and unreasonable price" was too vague to be sustained. In *Connally v. General Construction Co., supra,* it was held that the expression "current rate of per diem wages in the locality" was too vague. In *International Harvester Co. v. Kentucky, supra,* it was held that the expression "market value under fair competition and normal market conditions" was too uncertain to be sustained. In *Weeds, Inc., v. United*

States, supra, it was held that the standard of "excessive prices" was wanting in certainty. In *Cline v. Frink Dairy Co., supra,* it was held that a "reasonable profit" was insufficient. In *Champlin Refining Co. v. Corporation Commission, supra,* it was held that the term "waste", as used in a statute regulating oil production, was inadequate.

To the same effect are numerous decisions of state courts. Thus, in *People v. Pace,* 73 Cal. App. 548, 238 Pac. 1089, it was held that the expression used in a statute pertaining to the sale of securities "not made in the course of repeated and successive transactions of like or similar character" was too broad, vague and uncertain. In *In re Schmolke, supra,* the California Supreme Court held that the expression "usual transfer delivery zones" was void for indefiniteness. In *Vallat v. Radium Dial Co., supra,* it was held that the expression "reasonable and approved devices" was too vague.

The present case cannot escape the controlling force of these decisions. If such expressions as "unjust or unreasonable charge", "excessive prices", "current rate of per diem wage in the locality", "market value under fair competition and normal market conditions", "waste", "like or similar character", "zone", etc., are too indefinite to serve as legislative standards of conduct, *a fortiori* is such a combination of vague and indefinite terms as is comprised in the expressions "fair and open competition", "commodities of the same general class produced by others", and "any contract".

Since the provisions of the Fair Trade Act above referred to do not refer to any category established in the law, but in effect, are merely convenient designations

for whatever opinions a court or jury might have, they must be rejected as too indefinite, vague and ambiguous to constitute a permissible standard of conduct under the act. Without them the act itself becomes emasculated beyond recognition and its validity must, therefore, be denied.

Conclusion.

In conclusion, appellant respectfully contends that section 1½ of the California Fair Trade Act is unconstitutional, in that it deprives appellant of his liberty and property without due process of law, and that the judgment appealed from herein should be reversed.

Respectfully submitted,

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